IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 5948 of 1987

For Approval and Signature:

Hon'ble MR.JUSTICE P.B.MAJMUDAR

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1. Whether Reporters of Local Papers may be allowed to see the judgement? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

BHAVNABEN RAMESHCHANDRA SHAH

Versus

STATE OF GUJARAT

Appearance:

MR DG CHAUHAN for the Petitioner.

Ms.Binoda Gajjar, Assistant GOVERNMENT PLEADER, for Respondents No. 1-3

CORAM : MR.JUSTICE P.B.MAJMUDAR

Date of decision: 07/12/2001

ORAL JUDGEMENT

1. The petitioner has challenged the order passed by the Collector, Kheda, dated 5.5.1987, which is at Annexure `F' in the compilation. By the aforesaid order, the petitioner has been relieved from service from the post of Unpaid Candidate on the ground that she had

misbehaved with Mr.A.R. Malek and she slapped him on 5.5.1986 and that because of the same, she was subjected to show cause notice and, ultimately, after going through her reply, her services were terminated. The aforesaid order is impugned in the petition at the instance of the said employee on the ground that before passing the said order, no enquiry was held and that the petitioner was not given reasonable opportunity to defend her case. It is submitted that the impugned order is penal in nature and no such order can be passed without giving reasonable opportunity to the employee to defend such action. The petitioner was appointed as Unpaid Copying Clerk in 1978. It is averred in the petition that on 5.5.1986, Circle Inspector one Mr. Malek misbehaved with her and that she requested him not to misbehave with her and that, instead of controlling himself, he was annoyed and slapped the petitioner and, therafter, he filed a false complaint against the petitioner as if she had slapped him. It is further averred in the petition that before passing the impugned order, no departmental enquiry was initiated and without giving opportunity of being heard, her services were terminated. The appointment order of the petitioner dated 5.1.1978, is produced at page 11, Annexure `A'. By the said order, she was appointed as Paid Copying Clerk. It seems that as a Paid Copying Clerk, an employee has to perform the work of copying certain documents as per the requirement of the office and on the basis of the quantum of work performed by such employee, remuneration is to be paid to such an employee. It is not in dispute that the petitioner was accordingly performing the aforesaid work of Paid Copying Clerk since 1978. According to Mr.Chauhan, there were some Copying Clerks, who were performing similar type of work, but they were given appointments as Regular Clerks. One of such orders is produced at page 12, Annexure `B'. It is submitted by Mr.Chauhan that if the impugned order was not passed against the petitioner, she would also have got the benefit of appointment as a Regular Clerk on the basis of her long service as a Copying Clerk. Mr.Chauhan, further, submitted that, in any case, before passing the impugned order, adequate opportunity was required to be given to her and regular enquiry should have been initiated to find out the real truth. He submitted that, as a matter of fact, the petitioner herself was subjected to misbehaviour by Mr.Malek and instead of taking any action against the said employee, ultimately, the petitioner was subjected to the impugned order, by which her services were terminated. On the aforesaid ground, the impugned order is challenged in the present petition.

2. At the time of admitting this matter, following

order was passed by this Court (Coram : A.P. Ravani, J.) on 16.8.1990 :-

" ... ...

Rule. Mr.A.R. Dave appears for the respondents and requests for time for hearing as to interim relief.

The impugned order at Annexure `F' itself shows that principles of natural justice have not been complied with while passing the order in as much as the documents on which the Collector relied upon and which have been made the basis of the order have not been furnished to the petitioner. The documents have not been furnished on the ground that the petitioner is not a Government employee. The impugned order proceeds on the wrong assumption that the principles of natural justice are required to be complied with only in cases where employer and employee relationship exists between the Government and the other side. This is not so. All the public officers who are charged with a duty to act fairly and impartially are bound to observe the principles of natural justice while reaching at the decision. The principles of natural justice may have been engrafted in the rules governing the procedure for arriving at such a decision or even may not have been specifically mentioned in the rules. Even in cases where such provisions are not specifically mentioned in the rules, the public officer taking decision is bound to observe the principles of natural justice inasmuch as the principles of natural justice are nothing but fair play in action. No public officer needs command from the legislature that he shall act fairly. To act fairly is the duty enjoined with the public functions. Therefore, prima facie, it appears that the impugned order is in contravention of principles of natural justice and, therefore, it is a nullity. In this view of the matter, I was inclined to grant interim relief as prayed for at this stage. However, the learned counsel for the respondents requests that he be granted

some time so as to take appropriate instructions from the respondent-Collector so that the matter may be finally sorted out. Request granted.

S.O. to 27.8.90 for hearing as to interim relief.

... ..."

However, it seems that thereafter, there was no further order of interim relief and the matter stands as it is without there being any interim relief in favour of the petitioner.

3. The aforesaid petition is resisted by the Department by filing affidavit-in-reply. The affidavit-in-reply is filed by one M.B. Bhalgama, Resident Deputy Collector, Kheda. In paragraph 4 of the reply, it is stated that the petitioner has misbehaved with a Circle Inspector by giving him a slap in the Office and after holding preliminary enquiry, the respondent No.2 has dispensed with the service of the petitioner as a Copying Clerk. It is also stated in the reply that the petitioner is not a Government servant and she was appointed to work as a Copying Clerk and that she was paid remuneration on the basis of quantum of work done by her. It is stated that she was not appointed as a regular clerk, but was supposed to do only copying work in the Office. It is stated that she was paid copying charges as per the rate fixed by the Government. In paragraph 6, it is stated that on 5th May, 1986, the petitioner had slapped Circle Inspector Mr.Malek in the Office and in presence of other employees. A preliminary enquiry was conducted by the Deputy Collector and that the respondent No.2 was satisfied with the fact that the petitioner had slapped Mr.Malek and, thereby, misbehaved and misconducted and, therefore, it was decided to dispense with the services of the petitioner by the impugned order. It is stated that since the petitioner was not a Government servant, it was not necessary to hold any enquiry before taking the impugned action. It is stated that the respondent No.2 had appointed a Deputy Collector to look into the matter and upon perusal of the report submitted by the Deputy Collector, the impugned order was passed. It is stated that the petitioner was given show cause notice, calling upon her to show cause as to why action should not be taken against her for the alleged misconduct. The petitioner did not give any reply to the said show cause notice and also not asked for further time for giving her extension. It is further

stated in the reply in paragraph 7 that the petitioner had remained present on 17th March, 1987 and after hearing the petitioner, the respondent had taken the final decision on 6th May, 1987. Under these circumstances, it is stated in the reply that the principles of natural justice were followed.

4. Ms.Gajjar, learned Assistant Government Pleader, strongly submitted that since the petitioner was never appointed as a regular clerk, the provisions of the Bombay Civil Services (Discipline and Appeal) Rules are not applicable in her case. She further submitted that in spite of the aforesaid fact that she was not regularly recruited, yet, her explanation was called for by giving her show cause notice. She further submitted that the Authority having been satisfied that the petitioner had misbehaved with Mr.Malek, Circle Inspector, it was decided not to continue her service and accordingly, the impugned order was passed. In her submission, the impugned order, therefore, is passed after following the principles of natural justice and that the petition, therefore, deserves to be dismissed. She also further submitted that, in any case, she was not regularly recruited as a Clerk and she was appointed as a Copying Clerk as per the appointment order at Annexure `A' and was paid remuneration on the basis of the work which she was required to perform.

5. I have heard Advocates of both the sides in detail.

It is required to be noted and the same, as such, is not in dispute that she was appointed for doing the work of a Copying Clerk as back as in January, 1978 and she was continuously performing the aforesaid work till the impugned order was passed. It is no doubt true that she was not appointed as a regular Clerk in the Office and, therefore, the provisions of the Bombay Civil Services (Discipline and Appeal) Rules are not applicable in her case. However, in my view, simply because the provisions of the Discipline and Appeal Rules are not applicable, that does not mean that before taking action against an employee in connection with some alleged misconduct, principles of natural justice are required to be dispensed with. It is the case of the petitioner that there was torture to her from one Mr.Malek, Circle Inspector, and because of the said conduct of Mr.Malek, the unfortunate incident had occurred. Under these circumstances, at least, reasonable opportunity was required to be given to the petitioner to explain her case and in such circumstances, and looking to the

misconduct alleged against the petitioner, she should have been allowed to cross-examine the said Mr.Malek in order to find out the truth. The Department should have taken care to see that, if she was exploited by someone, the petitioner, being a lady employee, should have been allowed to canvass her case properly. Merely giving of show cause notice and getting reply, cannot be said to be enough compliance with the principles of natural justice looking to the alleged misconduct, for which the petitioner was subjected to show cause notice. It is also required to be noted that if at all any preliminary enquiry was held, it was ex parte. It is required to be noted that even reply was given by the petitioner, which is at Annexure `E', page 17. In her reply, she has pointed out that she is not aware about any sort of preliminary enquiry. She has not been given copy of the complaint filed by Mr.Malek and she has not been given reasonable opportunity to defend her case. She stated that her statement was taken by the Prant Officer, who was holding the aforesaid so-called preliminary enquiry. She has stated in her reply that, in fact, Mr.Malek had slapped her.

6. It is required to be noted that even if a person may not be a Government employee, yet, the employer, under whom she is serving, is supposed to follow the principles of natural justice if any action is required to be taken on the basis of some complaint filed by a co-employee. In the instant case also, the employer was required to follow the principles of natural justice in a fair manner. Looking to the seriousness of charge, regular enquiry was required to be held and, ultimately, truth was required to be found out whether the allegation of the petitioner is correct or not. Mr.Chauhan submitted that no lady employee would slap a co-employee unless there may be some cogent reasons. He submitted that if regular enquiry was held, the petitioner could have disclosed everything in the regular enquiry and she could have cross-examined Mr.Malek. According to him, therefore, reasonable opportunity is not given to her nor copy of the report of the enquiry Officer was made available to her. In my view, therefore, simply because the petitioner may not be entitled to have the benefit of the Bombay Civil Services (Discipline and Appeal) Rules, it would not mean that even though she has been appointed as back as in 1978 by the Mamlatdar, Nadiad, no enquiry should be held in connection with the incident in question. As stated earlier, looking to the issue involved, appropriate opportunity was required to be given to the petitioner before coming to the conclusion that she was guilty and she had slapped Mr.Malek, the

Circle Inspector on the relevant date. Considering the materials on record, it cannot be said that principles of natural justice are adequately followed in the instant case. It is not in dispute that the impugned order is penal in nature as the petitioner's services were terminated in view of the incident in question and on no other ground. In my view, therefore, in such slipshod enquiry, by giving her show cause notice, her services could not have been terminated without there being any appropriate departmental enquiry in this connection. In any case, she was required to be heard properly, her explanation was required to be taken into consideration and if necessary, she was allowed to cross-examine witnesses. These could have been done if regular enquiry was initiated to find out the correctness of the incident in question. Nobody could be condemned without giving appropriate opportunity to defend oneself. In this case, therefore, it cannot be said that the principles of natural justice are complied with by the Authority before passing the impugned order. It is submitted by Mr.Chauhan that the petitioner being a lady employee, the Department should have protected her by finding out the true facts about her case.

7. Under the aforesaid circumstances, I am of the opinion that the impugned order deserves to be set aside on the ground that the same is passed without affording appropriate opportunity to the petitioner to defend her case. It is, however clarified that by virtue of the present order, the petitioner will be allowed to be reinstated on her original post, which she was holding before the termination of her services.

8. Ms.Gajjar, learned AGP, submitted that she was appointed as Unpaid Copying Clerk. On the other hand, Mr.Chuahan submitted that she was appointed to the post of Paid Copying Clerk and but for the impugned termination order, she would have been appointed as a regular clerk, as has been done in the case of others. Ms.Gajjar has pointed out that no regular salaries were given to her and, therefore, there is no question of giving any back wages to her for the intervening period. I agree with the said submission of the learned AGP and considering the nature of the work which the petitioner was performing, naturally, there is no question of granting any benefit of back wages during the intervening period. Since her services were terminated because of the incident in question and since, in my view, she was not given appropriate opportunity to defend her case, I am setting aside the impugned order in question. However, if she is entitled to have any other

consequential benefits of seniority or getting absorbed on any other regular post by virtue of continuing as a Copying Clerk, and if any similarly situated Copying Clerk has been appointed as a regular clerk, it is for the Department to pass order in this behalf as per the Rules and precedent in this behalf. I am only setting aside the impugned order and by virtue of the same, the petitioner will be entitled to continue to serve as per the order at Annexure `A', page 11, as Copying Clerk and for that purpose, she will be entitled to have seniority, as if she had, all throughout, remained as a Copying Clerk in the Department. It is, however, clarified that without back wages, the petitioner will be treated to be in continuous service as Copying Clerk, i.e. the post which she was holding, as if the impugned order of termination was not passed against her.

9. The petition is accordingly allowed to the aforesaid extent. Rule is made absolute as indicated above, with no order as to costs.

7th December, 2001 (P.B. Majmudar, J.)

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(apj)